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7305

CASE NO. 7305

IN THE SUPREME COURT
of the
STATE OF UTAH

IN THE MATTER OF THE ESTATE OF VENNA DARLENE BEHM, Deceased. EDWARD C. BEHM.

Protestant and Respondent

VS.

ALMA GEE, personally, and as administrator of the Estate of Venna Darlene Behm, Deceased,

Appellant.

FILED
CLERK, SUPREME COURT, UTAH

BRIEF OF RESPONDENT

C. VERNON LANGLOIS,
RAY S. McCARTY
Attorneys for Protestant and Respondent

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TEXTS

STATUTES

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IN THE SUPREME COURT
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Appellant.

CASE NO. 7305

BRIEF OF RESPONDENT

ADDITIONS TO STATEMENT OF FACTS

In what the appellant terms the "Statement of Facts", there are many things omitted or passed over lightly, which the respondent feels should be brought to the attention of this court.

On page three of appellant's brief, the appellant sets out that the District Court of Salt Lake County

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authorized the administrator to make a settlement in the sum of $15,000.00 and to pay therefrom to his attorney, Shirley P. Jones, the sum of $3,750.00 attorney's fees "solely for services rendered in making and securing said settlement". Respondent feels that attention should be called to paragraph three of the petition of Alma Gee (R. 11-13), wherein he petitioned the court for authority to settle the case against Doctor Holbrook and allowance for attorney's fees.

> "That through the efforts of your petitioner's attorney, Shirley P. Jones, the said Dr. Von G. Holbrook has offered to pay to your petitioner for the benefit of the estate * * * "

That on page five of appellant's brief it states the administrator then petitioned the court "for distribution to himself by virtue of the said 'Assignment' and to the said minors, or in the alternative that he be allowed a quantum meruit for his services in the event the other distribution should be denied."

The respondent feels that the court should have its attention called to the fact that on the 23rd day of April, 1948, Alma Gee was cited into court to show cause why he should not be required to disburse immediately the $11,250.00 set forth in the petition to the heirs of the deceased, and further to show cause why this court should not declare the pretended assignment of April 28, 1947, to be null and void and of no effect (R. 22), and that on the day it came on for hearing, to-wit, April 27,

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1948, Attorney Jones served on respondent's attorneys objections to citation claiming:

1. That it appeared that Edward C. Behm was not interested in the matter.

2. That the matters set forth in the petition for order to show cause are not matters that can be determined in probate.

3. That it appeared from the petition that Behm had no interest in the matter, and that if he claims to have an interest, he should be required to proceed under the code of civil procedure.

4. That the citation and petition for order to show cause are not the proper methods of procedure to determine the matters and things set forth in the petition for order to show cause.

5. That citation in probate cannot replace a summons and cannot be a substitute therefor.

6. That it appeared that Behm would contest any petition for distribution and that the court could not determine the distributees or the amount of distribution unless and until a determination of the rights of Edward C. Behm had been made in a proper proceeding brought for that purpose.

7. That Alma Gee individually or personally was not before the court in this proceeding and his rights cannot be determined therein.

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That said matter was taken under advisement by the Honorable J. Allan Crockett, and that on the 20th day of May, 1948, he entered his order overruling objections to the citation and ordered that Alma Gee be and appear before the court ten days after notice. That this notice was served on the 16th day of August, 1948, on Attorney Jones and was made returnable the 10th day of September, 1948, and that the said Alma Gee then did not, as set forth in appellant's brief on page five, merely ask that the court distribute to himself by virtue of assignment and the minors, or in the alternative that he be allowed a quantum meruit for his services in the event the other distribution be denied, but that he also filed a complete final report and account and petition for distribution and discharge, which set out practically everything usually put out in closing of a decedent's estate, except as to having the vouchers of the last illness and funeral expenses attached. It set out the costs, which included publication of notice to creditors and other matters. That it set out in the petition that petitioner had on hand in cash the balance of $11,218.80 for distribution to himself as guardian of said minors, and to himself personally as assignee of said Behm, and that he set out in said petition that he was entitled to a fee as administrator or trustee, in addition to his assigned share, in the sum of $460.00, and he had arranged with Attorney Shirley P. Jones to accept the sum of $500.00 for his fee in the estate matter and also for his fee in the guardianship matter in the estates of said minors. He set forth that the petition of Behm to set

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aside the assignment was without merit, sham and false, and he, Gee, was entitled to the reasonable value of his services, and that the services consist of the aforesaid guardianship proceedings, the suit against Von G. Holbrook, and that said services are reasonably worth the sum of $4,210.00, which he was willing to reduce to $460.00 upon receiving one-third of the aforesaid $11,218.80.

Additions to Testimony

The appellant in presenting the testimony at the hearing has stressed parts of the evidence and passed over much other evidence and omitted some entirely; so, the respondent at this time will submit the following for the court's attention:

Alma Gee was sixty-three years old (R. 130). He works for wages for the Kearns Corporation as a guard and receives $150.00 per month. He took the money, the $11,250.00, and deposited it in the bank and took it out on the advice of Attorney Larson (R. 136); he put the moneys in various places in his house, in his locker, and he paid Mr. Larson $200.00 (R. 137-8).

Mr. Gee first stated he did not know how much money he had left (R. 132). The court several times had to insist that Mr. Gee tell about the money. The first time (R. 132), upon demand of counsel for Behm that Mr. Gee bring the money into court, Mr. Jones stated:

"MR. JONES: At this time, I assumed this money was in Continental National Bank and

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Trust Company in deposits in the name of the guardian.'' (R. 133)

Gee first received the money about the 8th of January, $15,000.00, and received a check from Jones. In April he withdrew the money because he did not think it was safe (R. 133-5). He said that he paid some bills, including $200.00 to Mr. Larson (R. 138). Mr. Gee could not tell whether he had spent $1,000.00, $2,000.00 or $5,000.00 of the money. The court again admonished Mr. Gee that he had better answer, at which time he said he thought there was $6,000.00 or $7,000.00 left of the money, and said he doubted if there was $7,000.00 left. Mr. Gee stated that he knew he only had a $100.00 bond up in the matter. The court again admonished Mr. Gee (R. 139). Again the court ordered Mr. Gee to bring the money in by 2:00 o'clock (R. 140).

Miss Beveridge, of the Continental National Bank, testified that the opening deposit by Mr. Gee was on January 28, 1948, of $5,000.00 and on May 7, 1948, there was a withdrawal of $4,999.00, leaving a balance of $1.00 which left the account open, and that on May 13, 1948, there was a deposit of $11,250.00, making a balance of $11,251.00, and on June 30, 1948, a withdrawal of $11,250.00, leaving a balance of $1.00.

After the noon recess, at 2:00 o'clock, Mr. Gee again took the stand and stated that he had the $7,500.00 for the babies. Upon Mr. McCarty's demand and the court's order, this $7,500.00 was given to the clerk and impounded. About this time, Mr. Jones had great qualms

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as to whether he was violating any of the canons of ethics of the American Bar Association, and after some discussion and assurance that his professional standing would not be lessened in any way, he decided to remain in the case, even though he were a witness, to which respondent's attorneys had and still have no objection.

Mr. Gee remembered being in Judge Crockett's court on the 28th of April, 1948, on an order to show cause why he should not be required to disburse the $11,250.00 and to show cause why the assignment, Exhibit 6, should not be declared null and void (R. 148), and thereafter, on May 7, 1948, he withdrew the money from the bank the first time. He put the money back in the bank on May 13, 1948 (R. 150). He had it out of the bank for six days. Upon the demands of Mr. McCarty to know what he had done with the balance of $3,750.00, he stated he had spent $550.00 on his daughter, and upon demand as to where the rest of the money was, and upon the court telling him he was $3,000.00 shy, the witness shouted:

> "A. Give them the three thousand, and give them all if they want it all.
>
> "Q. Have you the $3,000.00 here?
>
> "A. I have hoarded that money for ten months. I am sick of it.
>
> "THE COURT: Yes, I want you to give the money you have, to be divided.

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"MR. McCARTY: May we have that counted and placed in—

"A. I hope that balances it.

"THE COURT: Well, I was quite certain that that six thousand was going to be increased around here when we got down into it. That's why I wasn't very patient this morning." (R. 153)

Thereupon $3,000.00 more was paid into court. Mr. Gee testified that before this matter started he knew that if Behm had any idea there would be any big money recovered, he, Behm, would want part of it (R. 156).

Gee admitted that when he signed the petition for discharge he had the sum of $11,218.80 for distribution, but qualified himself by saying he signed it on the spur of the moment (R. 162).

Mr. Larson's cross-examination brought out the fact that he, Larson, had informed Mr. Gee that it was not a probate case (R. 163).

That later, about the 22d or 24th of August, Gee retained Mr. Larson, and at that time he informed Attorney Larson that he was afraid Behm would attach part of the money, and that Larson told him to remove it to some other bank or take care of it in such a way that he would not attach it (R. 163). Gee testified that in discussing the suit with Behm he said, "Let's go in partners, Ed", and he said, "No, I don't want anything to do with it at all" (R. 203).

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Gee also testified that he told Behm he would see Mr. Jones and see what he says, and that when Behm would not go in with him on it, he said, "When you give me permission to sue on this, then you are out of it" (R. 204).

Shirley P. Jones was first called by protestant. Mr. Jones testified he only knew Mr. Gee on this case. He did not know that he was employed as a watchman, and did not know what his position was except that he understood Mr. Gee worked for the power company.

Mr. Jones knew that when he gave him his check, Exhibit 9, a check for $11,250.00, payable to Alma Gee, administrator estate Venna Darlene Behm, that there was only a $100.00 bond up in each case, and knew that the bond was signed by Alma Gee's wife and one other member of the family. Mr. Jones testified that the court fixed the bond and the court knew about the settlement (R. 166-8).

Witness Jones was called by the appellant. He first became interested in the case against Doctor Holbrook the last of February or the first of March, 1947, and the people that he talked to about the case were Mr. and Mrs. Gee; in fact, they were the only people he talked to about the case (R. 179). The only time he talked to Mr. Behm was when he signed the petition on the 11th of April, 1947. Mr. Jones testified that there had been a lot of preliminary work getting the petitions for filing, and when they were ready Mr. Gee brought Mr. Behm in and introduced him to Attorney Jones, and

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he gave Mr. Behm the petition for appointment of administrator and the petition for appointment of guardian and asked Mr. Behm to read them, which he did. Mr. Jones asked him why he did not go ahead as administrator and why he did not go ahead as guardian, being the husband and father, and said he explained to him that he and the two twins were the only ones that could recover under the law. Behm replied that he did not want anything to do with it, and he said, "If you sign these documents, you authorize Mr. Gee to take charge of the estate and to take charge of the property of the minors, and you are out", and Behm said, "Yes, I understand that" (R. 182). Witness Jones could not remember the wording, but he said something was said by him or Mr. Gee that Mr. Gee was not willing to undertake all this unless there was some assignment in the case, and it was as a result of the conversation in Attorney Jones' office that he drew the document, the assignment.

Mr. Jones stated he took Behm in to Gordon Strong, a notary public, introduced him, and said, "This is the father of the babies in the Holbrook case and the husband, and he is signing away his rights to his father-in-law, and I want you to notarize it", and Mr. Strong did. Attorney Jones denies that Behm called Mr. Langlois.

Mr. Jones said that in November or December, after the attorneys for Doctor Holbrook wanted to settle the matter, that Behm came in, said he had some valuable evidence which consisted of a statement of some nurse

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that they could get a hundred thousand dollars from Doctor Holbrook. Witness Jones said, "This matter is going along all right", and Behm said, "Well, I am going to see the attorneys for Doctor Holbrook", and Witness Jones said, "You stay away from the attorneys for Doctor Holbrook; you have nothing to do with this matter" (R. 183-A, not marked). He left and Attorney Jones never saw him again until he came into his office with Mr. Langlois.

He did not ask Behm to come and see him. He had everything prepared before Behm came to his office except the assignment. He did not discuss the amount that Behm had put up for doctor bills. Mr. Jones, when asked whether he treated this as an estate and gave notice to creditors, stated that he paid no attention to it; that there was no controversy; the only thing he wanted to have was an administrator appointed and bring a law suit.

Mr. Jones said that he prepared the final account and report and petition for distribution and discharge, and that he asked for $500.00 additional, that he figured that the estate and guardianship matters from the beginning to the conclusion were worth that (R. 187). Then Mr. Jones testified: "I agreed with you that the trust company should be the one that would handle this money for the children and that that would be satisfactory with me" (R. 188).

Mr. Jones did not inform Behm there had been a $15,000.00 settlement. He did not see any occasion to.

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He treated the matter as an estate, but did not inquire about funeral expenses (R. 188). Mr. Jones never discussed with Gee who paid the funeral expenses and did not ask about them. He did not make any endeavor to find out whether or not they had been paid.

> "Q. Did you feel it would be a fair assignment for this man, if the bills had not been paid, that Mr. Behm should pay the bills and also turn over a third of what was recovered less your fee to Mr. Gee?
>
> "A. I never thought anything about it, Mr. McCarty. Mr. Behm was completely disinterested in the whole thing. At the time it came to me, it didn't appear that there would be any recovery.
>
> "Q. Oh, it didn't appear at the time when he signed that petition, you didn't think there would be any recovery?
>
> "A. I didn't say that.
>
> "Q. Well, did you think there would be a recovery when he signed the petition for guardian and for administrator?
>
> "A. I thought if there was any recovery and Mr. Gee did all the work and carried all the responsibility, that he should be protected in it."

Mr. Jones also testified that he told Behm that he was entitled to one-third of whatever was recovered; in fact, he said he read him the statute. Thereupon, counsel for respondent asked him to show the statute, that he would be interested in reading that statute that showed one-third. Whereupon Mr. Jones states, "It is the death statute of the personal representative and the heirs",

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and said he interpreted it always that they share in the proportion that they are heirs. All papers were prepared for Mr. Behm when he came up to Attorney Jones' office except Exhibit 6, the assignment (R. 191-2).

After the conference on the 11th, Mr. Jones testified that he drew the assignment, gave it to Alma Gee to have Behm sign it, and bring it back. Mr. Jones testified as to all the consultations in his office with Mr. Gee. He did not give notice to Mr. Behm in the petition for permission to settle the claim. He said Mr. Behm was out of it (R. 199).

Argument

The respondent feels that he should discuss Point II out of order for the reason that if we have a clear understanding as to what is involved in this case, we will make the remainder of the questions much easier to dispose of.

POINT II

Distribution and proportions of distribution of the recovery.

It is obvious from the whole proceedings in this case that appellant was laboring under the impression that this was a probate action and that the action for wrongful death belonged to the estate. The assignment, Exhibit 6, attempts to assign an interest in an estate; the petition for permission to settle claims (R. 11-13), objec-

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tions to order to show cause (R. 24-25), final report and account and petition for distribution and discharge (R. 31-34) all seem to be based on the assumption that this was a probate matter. Attorney Larson informed Mr. Gee that it was not a probate case (R. 163). It was evidently after Mr. Larson's entry into the case that the attorney for the appellant began to realize that this was not a probate case.

That the case for wrongful death is no part of a decedent's estate is the established law in Utah. Quoting from *Morrison v. Perry,* 104 U. 151, 140 P. (2) 772 at page 780:

> "It is undisputed in the evidence that deceased's widow paid $819.40 for funeral services and that this amount was reasonable. There is, however, no evidence that the estate was insolvent, nor was there evidence to show whether or not the widow made a claim against the estate for reimbursement, or whether or not she was in fact reimbursed from the estate. If the widow was reimbursed from the estate was she damaged in this particular? The answer is obviously no, if we keep in mind that the estate is separate and distinct from the plaintiff or the statutory beneficiaries in this action. The estate may be damaged to that extent but the estate is not a party under our death statute. Mason v. Union Pacific Railway Co., 7 Utah 77, 24 P. 796.
>
> (At page 781) "This court in the case of Mason v. Union Pacific Ry. Co., 7 Utah 77, 24 P. 796, held that the death statute, 104-3-11 of the R.S.U. 1933, was not a survival statute but that it created a new cause of action in the heirs.

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> The Mason case, supra, has since been approved in Halling v. Industrial Commission of Utah, et al., 71 Utah 112, 263 P. 78."

Of course, suit could be maintained by the administrator of an estate of decedent, but the recovery for the wrongful death would not be subject to the debts of the decedent nor expenses of administration of the decedent's estate. In other words, the administrator would be acting in a dual capacity, that is, as representative of the heirs in the wrongful death, and administrator of the decedent's estate, and they definitely would have to be kept separate.

To justify the appellant's actions throughout, he must justify his attempts to distribute the recovery for wrongful death according to our laws of distribution in probate. Appellant's brief has given us a part of the history of our wrongful death statute, but for some reason or other he has not given us a complete history of the act. The Compiled Laws of Utah, 1888, Vol. 2, page 179, state:

> "Sec. 2961. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have

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been caused under such circumstances as amount in law to felony.

"Sec. 2962. That every such action shall be brought by, and in the names of the personal representatives of such deceased person, and the amount received in every such action shall be distributed by direction and decree of the proper probate court, to such persons (other than creditors) as are by law entitled to distributive shares of the estate of such deceased person, and in such porportions as are prescribed by law. Provided, that every such action shall be commenced within two years after the death of such deceased person; and provided further, that the damages so recovered shall not in any case exceed the sum of ten thousand dollars."

Thus, we see that at one time we had the method of distribution that appellant is now so ardently claiming is the only fit and proper procedure. However, the legislature, in 1901, repealed section 2962. The legislature certainly did not repeal that section because it wanted to keep that method of distribution in force.

The case of *In Re Riccomi* (Sup. Ct. Calif., 1921), 197 P. 97, 14 A.L.R. 509, discusses this very question, and holds that it is the pecuniary loss to the heir by reason of the death that is recoverable, and that only, and that it follows inevitably that there can be no substantial recovery on account of any heir who has not suffered any substantial pecuniary injury. The case at bar and

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the Riccomi case seem to coincide in more than one way. We quote:

> (At 14 A.L.R. 511) "A review of the decisions in this state under this statutory provision makes it clear that the claim of the appellant is based upon a complete misconception of the settled construction of the statute and its purpose and object.
>
> "It is settled that the action authorized by the section is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary loss suffered by them by reason of the loss of their relatives. The money recovered constitutes no part of the estate of deceased, and where the action is brought or the money recovered by the personal representative of the deceased, such personal representative is acting solely as a statutory trustee for the benefit of the heirs on account of whom the recovery is had."

There is another similarity in the two cases. We quote:

> (At page 513) "It is interesting to note that our original statute relative to actions of this character (Stat. 1862, p. 448) contained a provision directing distribution of the proceeds of the action to 'the widow and next of kin, in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate', and that, when it came to the enactment of the Codes, the whole subject-matter was revised, and the direction as to distribution entirely omitted."

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While *In Re Riccomi,* supra, may be the only authority that is cited under appellant's quotation from 16 *Am. Jur.,* Sec. 251, page 152, as authority that distribution, when not fixed by statute, shall be on the basis of the pecuniary loss sustained by the distributees, there are many other cases. See: *Hurley v. Hurley* (Sup. Ct. Okla., 1942), 127 P. (2) 147; notes, annotation 14 *A.L.R.,* page 516; *Schultz v. Western Farm Tractor Company,* 190 P. 1007, 14 *A.L.R.* 514 and annotation.

In the case of *Murphy v. Duluth Superior Bus Company* (Sup. Ct. Minn., 1937), 274 N.W. 515, 112 *A.L.R.* 27, the statute provided:

> (At page 29) "The damages therein . . . shall be for the exclusive benefit of the surviving spouse and next of kin, *to be distributed to them in the same proportion as personal property of persons dying intestate.*" (Italics supplied.)

The statute governing distribution provided:

> (At page 29) "If there be no issue nor spouse, the estate shall descend to the father and mother in equal shares, or if but one survive, then to such survivor."
>
> "In ordering one-half of the balance of the settlement money distributed to the respondent, the court was merely following the clear and express language of these statutes. It is true that the amount of recovery under section 9657 is limited to the pecuniary loss of those for whose benefit action may be brought. Dunnell, Minn. Dig. (2d Ed.) Sec. 2617. And as a result, in the action to recover in this case for the death of the

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> boy, the damages would be limited to the pecuniary loss of the appellant, since the respondent suffered no such loss because of his death."

In this case, for the death of a child, the recovery was divided between the father and the mother. The father had divorced his wife when the child was young, and she lived separate and apart from the child. He had borne the entire burden of support and care of the child, and the child never knew his mother as such, and the evidence showed that she suffered no pecuniary damage. The Supreme Court upheld the decision of the lower court to award the mother half of the recovery. The court in discussing this case said:

> (At page 29) "However, according to the provisions of section 9657, once the amount of the damages is determined and recovered, respondent is entitled to one-half of that amount. To say that this is anomalous is somewhat of an understatement. There can be no better illustration of how unjust the result may be than that reached in the instant case, but this inconsistency has been created by the Legislature and not the court. To reach a different result would violate the express wording of the statute. We have on at least two previous occasions considered these statutes with regard to this particular question."

The court later in the opinion states:

> (At page 29) "An amendment to section 9657 to remedy this situation would seem to be most desirable. That is within the province of the Legislature and not the court."

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As we have seen earlier in this argument, Utah and California did correct that situation by amendment. Of course, the court may use the laws of distribution in probate as a guide, and, in certain circumstances, perhaps that method would furnish an equitable and just distribution.

Faulkner v. Faulkner (Sup. Ct. Ark., 1933), 57 S.W. (2) 818, quoted on page 47 of appellant's brief, says:

> "The statute as interpreted makes pecuniary injury the basis of damage and of the participation in any judgment recovered. The dependence of the plaintiff and whether or not the deceased had contributed to his support are merely evidentiary facts from which, with other circumstances in the case, the question of the pecuniary injury and its extent is to be ascertained. The distribution not having been prescribed by the governing statutes (Section 7138) and the mode named in section 1075 not been applicable, *it becomes the duty of the court to formulate a rule of distribution consonant with reason and the principles of sound justice.* (Emphasis our own.)
>
> "It is not difficult to perceive how the rule provided for in section 1075 or how any other fixed and arbitrary rule might be the occasion of an unfair division by which one in no sense in need and in every sense unworthy and who had received and had no right to expect any contribution would share equally with those entirely dependent and most worthy and who had in the lifetime of the deceased been the principal beneficiaries of his bounty and had the right to expect that this would continue. * * *

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"It is clear that simply because one is among the number of next of kin does not entitle him to recover damages or share with the others, but it must appear that some pecuniary injury to him must have been suffered. If then the injury suffered is the basis of the recovery, the extent of that injury, as compared with others of the next of kin, ought to be the measure by which his proportionate share in the damages recovered should be ascertained."

Let us see what *In Re Aronowitz,* 272 N.Y.S. 421, cited in appellant's brief at page 45, says:

"The facts of the present case serve as a striking illustration of the inequity frequently produced by this procedure. Here the husband was 80 years of age at the time of the accident. His expectancy of life was but 4.39 years. If this be assumed that the age of one child was 20 and of the other 25, their expectancies were 42.20 and 39.49 years respectively. Since the decedent was 56 years old at the time of her death, her expectancy of life was 16.72 years. It is obvious, therefore, that, all other factors being equal, the loss from the death was approximately four times as great for each of the children, as for the widower, and that, viewed from this standpoint, any recovery should be divided approximately into ninths, with four thereof being payable to each child and only one to the husband. Under section 133 of this statute, however, the direction is mandatory that 'the damages recovered . . . must be distributed . . . as if they were unbequeathed assets . . .'; in other words, that the regular devolution prescribed by the statute of distribution governs, which in this case gives one-third to the husband

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and a like proportion to each child. Decedent Estate Law, P. 83, subd. 1.

> "It would not be difficult to imagine even more striking inconsistencies in the application of the law by its diversion in distribution to one person of sums which were in reality awarded as compensation for the loss of another. The remedy for the condition is, however, a legislative, and not a judicial, function."

In *Snedeker v. Snedeker* (1900) 164 N. Y. 458, 58 N. E. 4, cited at page 48 of appellant's brief, the court said:

> "We are not insensible to the peculiar hardship of this case, where a widow, left without means of support, is compelled to divide the net amount of the judgment she has recovered as administratrix with a man of means (the father of the deceased), possessed of considerable real and personal property. We must, however, construe the law as it is written, regardless of the seeming injustice inflicted in particular cases by the existing rule."

Counsel for appellant seems to be as confused over the words, "pecuniary loss", as he was over our wrongful death statute. He quotes on page 55 of his brief from *Evans v. Oregon Short Line Railroad Co.*, 37 U. 431, 108 P. 638:

> "* * * the jury should be admonished that in no event can the pecuniary necessities or the physical requirements of the wife or children be considered for the purpose of enhancing the damages

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> which were caused by the negligent act complained of."

He seems to be confused between the action for wrongful death and the distribution. Certainly if a father, who was a hopeless cripple and very aged and had contributed nothing towards his children's support, and who only had a life expectancy of a few months, should be killed by wrongful act, the defendant would not be required to pay a great amount of damages merely because the wife and children happened to be in dire need and in poor physical condition. However, as was pointed out in the case cited by respondent, after recovery is made the physical conditions and pecuniary necessities of the heirs may be taken into consideration to determine the distribution of the recovery.

On page 57 of his brief, appellant states:

> "Obviously, if an heir is entitled to his proportionate share, it must be in the proportion that he is an heir, otherwise the action would not be for his benefit as an heir."

The proportion means according to the proportion of the heir's pecuniary loss, and it has been so held in *Faulkner v. Faulkner,* supra, *Snedeker v. Snedeker,* supra, and *Hurley v. Hurley,* supra.

Appellant complains about the lower court failing to fix any pecuniary loss for the protestant, Edward C. Behm, the father of the children. Behm did not object, and, if there were any error in the court's ruling, it is

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certainly not the privilege of the appellant to raise that question. Edward C. Behm would probably have been entitled to a portion of the recovery and also the amount expended for medical services and funeral expenses for the deceased. He stated that he was willing that all of the recovery go to the two babies. Behm has not cross-appealed and he accepted the ruling of the court in that regard.

While the respondent does not approve of Alma Gee receiving $750.00 quantum meruit, he did not raise any objection. He was anxious to settle and end this litigation without having all of it dissipated in expensive court proceedings. The lower court recognized the rule that even in champertous contracts with attorneys, the attorney is still entitled to quantum meruit, and while in this case the lower court allowed $750.00, which was far in excess of any services rendered by Alma Gee, that finding was not complained of by the respondent. Ordinarily, in the cases that come up every month in our District Court, the special representative, who is merely a figurehead, is generally a younger lawyer in the firm's office, and on recoveries ranging from $30,000.00 to $100,000.00 the special administrator or representative or trustee, call him what you will, is paid from $50.00 to $75.00.

The appellant occupies much space in his brief setting forth the faithful, hard work and the value of the services of Alma Gee, the appellant, but he lets the cat

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out of the bag in his petition for approval to settle the case against Doctor Holbrook. See Paragraph 3 (R. 11):

> "That through the efforts of your petitioner's attorney, Shirley P. Jones, the said Dr. Von G. Holbrook has offered to pay to your petitioner * * *."

and that is exactly what it was. The recovery was made solely through the efforts of Attorney Jones. The testimony of Witness Jones about the countless consultations he had with this 63-year-old watchman about technical, medical problems is absurd on the face of it. Alma Gee's salary was $150.00 a month. The lower court allowed him $750.00 quantum meruit. Alma Gee spent approximately $30.00, some of it uselessly, such as notice to creditors. That left him $720.00, or more than he made in four months as a watchman. The record does not disclose that Mr. Gee lost a single, solitary day of his work on account of his efforts as administrator, special representative or trustee, whatever appellant's attorneys wish to label him.

Appellant claims that Alma Gee was entitled to the same compensation as an attorney in this matter. Respondent feels that the time-honored custom of attorneys paying their investigators out of their fees should not be disturbed, and the respondent believes that the client should receive at least a portion of the recovery.

The appellant complains of the $500.00 distributed to Mr. Behm for the use and benefit of his attorneys, claiming that nothing was done. This much was accom-

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plished: An attempt to take an additional attorney's fee and administrator's fee was blocked. Notwithstanding appellant's disclaimer of attorneys' fees in the appeal, the record clearly shows the appellant's intentions in that regard. The attempt to take $3,750.00 from the fund by reason of a pretended assignment was foiled, and $10,500.00 was recovered for the benefit of those entitled to it.

POINT I.

The validity of the Assignment, Exhibit 6.

(A) *Assignability of Behm's Share of any Recovery.*

The cause of action for wrongful death is non-assignable.

In the early case of *Fritz v. Western Union Telegraph Company,* et al. (1903), 25 U. 263, 71 P. 209, on page 280 of the Utah Reports:

> "While we do not think that such an assignment can be valid or of any effect, yet, even if it were, still the real party pointed out by the statute, to-wit, the personal representative of the deceased, brought this action, and a judgment herein will be a complete bar to any action now or hereafter brought by the heirs or their assignee. Rev. St., sec. 2912. Besides, this objection was urged too late, and must be held to have been waived. 'The objection that the plaintiff in an action is not the real party in interest, as required by the Code, when available by way

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> of defense, must be raised by demurrer or answer, or it will be considered to have been waived.' "

We also depend on the case of *Johanson v. Cudahy Packing Company,* 100 U. 399, 115 P. (2) 794, 101 U. 219, 120 P. (2) 281, and 107 U. 114, 152 P. (2) 98.

Corpus Juris Secundum, Vol. 6, page 1082, section 33, states:

> "In the absence of statutory modification, a cause of action for death by wrongful act is not assignable, and it has been held that, prior to verdict or judgment, the beneficiary's claim for damages is a mere expectancy, or inchoate right, not a debt, and not assignable."

The law does not preclude an assignment of the claim to a representative or an administrator for the purpose of bringing a suit, the recovery, of course, to be held in trust for the heirs. It would be an anomalous situation for a stranger to the action, who has suffered no pecuniary loss, who was not an heir, to be able to recover damages in an action for wrongful death. Even a creditor cannot maintain such an action.

Now, let us see what appellant did in this matter. In Case No. 80962, *Alma Gee, admr., etc. v. Von G. Holbrook,* which was introduced in evidence, paragraph 10 of the complaint reads as follows:

> "That as a result of the negligence and carelessness as aforesaid the said heirs of the said deceased and the said estate of the said deceased incurred funeral expenses in the sum of $1000.00,

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> and were damaged in the total sum of $26,000.00, and the plaintiff brings this action for the benefit of said heirs."

This was signed and filed after the execution of the assignment, Exhibit 6. Why didn't the appellant state in said paragraph: "and plaintiff brings this action for the benefit of said minor children, Venna Julene Behm and Cheryl Darlene Behm and Alma Gee, as assignee of Edward C. Behm, the father"? Witness Jones testified that Edward C. Behm was out of it before this suit was filed. What would then have been Alma Gee's basis of recovery or pecuniary loss? No, Lord Campbell's Act never was enacted for the purpose of compensating strangers or people who might make it a practice to go around getting assignments of another's right of action or the proceeds of the recovery.

Personally, we cannot see the difference between the assignment of the right of action and the assignment of the proceeds of recovery, except perhaps the latter would deprive a defendant in a suit for wrongful death of the defense that the person asking recovery suffered no loss. Clearly the assignment was void on the face of it.

(B) *There was not only an actual fraud perpetrated by Alma Gee in this case upon the protestant, Edward C. Behm, but there was an equitable fraud by reason of the trust and confidence arising out of the relationship existing between Alma Gee and Edward C. Behm, and therefore, Alma Gee has the burden of establishing that the assignment, Exhibit 6, was obtained in good faith and*

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under circumstances excluding undue influence, deceit, or any improper means.

The Utah Supreme Court is committed to the doctrine that fraud is presumed in transactions between persons occupying a fiduciary relation, and the party benefited has the burden to show that the transaction was fair.

Omega Inv. Co. v. Woolley (1928), 72 Utah 474, 271 P. 797.

The question arises: Did a confidential relation exist in this case at bar? Alma Gee was the father-in-law of Edward C. Behm. Edward C. Behm had full faith and confidence in his father-in-law; that he was called to the office of Attorney Jones on April 11, 1947; that Alma Gee had seen Attorney Jones before; that they submitted to Behm the petition for administrator and for guardianship. He had faith and confidence in Alma Gee and consented that Gee be guardian of the estates of the minors. He consented that Alma Gee be the special representative or administrator in whose name the doctor was to be sued. Witness Jones claimed he informed Behm concerning the assignment at that time on April 11, 1947. This Behm denied. The court evidently believed Witness Behm and evidently disbelieved Witness Gee and Witness Jones. Finding No. 4 states there was no consideration given Edward C. Behm by said Alma Gee for said assignment, and Edward C. Behm did not fully

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comprehend the import of said assignment, and he had not been fully and completely instructed as to his rights in said matter (R. 57).

At the time Exhibit 6 was signed, Behm had already petitioned for the appointment of Alma Gee as his special representative and trustee. It is clear that prior to the execution of Exhibit 6 Alma Gee had assumed to act in the matter and take charge of the affairs concerning the suit against Doctor Holbrook. He had before that time procured the attorney, Shirley P. Jones. He had had the papers prepared. Under such circumstances, it is clear that there was a confidence generated in Behm's mind, reposed by him in his father-in-law, Alma Gee, and he furthermore was acting in a fiduciary capacity. It in no manner or at all lessens his obligation because he had not then been actually appointed by the court. The assignment itself stated that he had instituted and will continue to carry on further proceedings for the recovery of said estate, etc.

The Supreme Court of Utah in the case of *Omega Inv. Co. v. Woolley,* supra, states:

> "A confidential relation exists when confidence is reposed by one party and a trust accepted by the other, when a confidence has been imposed and betrayed, or when influence has been acquired and abused. It embraces both technical and fiduciary relations and those informal relations where one man trusts in and relies on another. Dale v. Jennings, 90 Fla. 234, 107 So. 175."

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The Supreme Court of Utah quoted from *Pomeroy on Jurisprudence* as follows:

> "The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief 'where influence is acquired and abused, or where confidence is reposed and betrayed'. It is specially active and searching in dealing with gifts, but is applied, when necessary, to conveyances, contracts executory and executed, and wills."
>
> 2 *Pomeroy's Equity Jurisprudence*, Sec. 951.

The Court then held that where a confidential relation was shown to exist, the burden rested upon the party benefited by the transaction or the transfer to show that the fullest and fairest explanation and communication was made to the party reposing such confidence, and that the transaction itself was fair and the consideration therefor adequate, before a court is justified in permitting such a transaction or assignment to stand.

The court said, again quoting from Pomeroy:

> "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the result-

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> ing superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal."
>
> 2 *Pomeroy's Equity Jurisprudence,* Sec. 956; 74 Utah 486.

In *Odell v. Moss,* 130 Cal. 352, 62 P. 555 (1900), it appeared that a brother had deeded certain property to his sister. It appeared that he reposed confidence in that sister, and the Supreme Court of California held that under the circumstances the transaction was constructively fraudulent, and that the burden was upon the sister of proving affirmatively that influence was not used to obtain the deed. The court pointed out that the relationship of brother and sister was not in itself a fiduciary relation, but that it was a material circumstance in considering the question whether in fact such a relation existed.

The court said:

> "The evidence on this point, we think, clearly establishes the fiduciary relation. It is expressly found by the court that by reason of the relation existing between them, the defendant 'reposed in plaintiff especial confidence and trust'. (62 P. 556)"

In the case at bar, it is clear that Edward C. Behm reposed great confidence in his father-in-law, Alma Gee, at the time he signed the petition for guardianship and

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the petition for appointment of Alma Gee as administrator at the office of Shirley P. Jones on April 11, 1947, and that he reposed great confidence in him when he signed Exhibit 6 on the 28th day of April, 1947.

On page 28 of appellant's brief, the assignment is referred to and it states:

> "The 'Assignment' is here in evidence and demonstrates that any school boy upon reading it would understand it.

Let us see whether or not it is understandable:

> "Exhibit 6
>
> "Edward C. Behm, the husband of the above entitled deceased, for a valuable consideration
> AND for the further consideration that Alma Gee, the father of said deceased, has instituted and will continue to carry on further proceedings for the recovery for said estate of anything due it for the death of said deceased, and particularly anything due the minor children of the undersigned, and the said deceased does hereby assign, transfer and set over unto the said Alma Gee all his right, title, claim and interest in and to the said estate, the proceeds thereof, and particularly the proceeds of any recovery made or recovered from Von G. Holbrook, or any recovery made or recovered for the death of said deceased. It is expressly understood that the said minor children shall receive their full share of said estate free and clear of this assignment to be administrated under the guardianship proceedings heretofore

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instituted on their behalf by the said Alma Gee with the consent of the undersigned.

"Dated at Salt Lake City, Utah, this 28th day of April, 1947.

(Signed) EDWARD C. BEHM
Witness: (Signed) AMY C. GEE
(Signed) JULENE GEE."

It states: "Alma Gee * * * has instituted and will continue to carry on further proceedings for the recovery for said estate of anything due it for the death of said deceased". A school boy would be misled, because the recovery was not for the estate; it was for the heirs. "*And particularly anything due the minor children of the undersigned*". Why was that put in? Appellant has insisted all along that the father had a one-third share. It may be clear to any school boy, but it is not clear to the writer why that particular emphasis should be placed upon the children, unless it was to convince the father, Edward C. Behm, that this action was solely for the benefit of the children.

And on line 7 it states: "and the said *deceased* (emphasis added) does hereby assign, transfer and set over unto the said Alma Gee all his right, title, claim and interest in and to the said estate, the proceeds thereof, and particularly the proceeds of any recovery made or recovered from Von G. Holbrook, or any recovery made or recovered for the death of said deceased". He would have to be a Phi Beta Kappa school boy to figure that one out.

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Then we come down to: "It is expressly understood that the said minor children shall receive their full share of said estate free and clear of this assignment to be administrated under the guardianship proceedings heretofore instituted on their behalf by the said Alma Gee with the consent of the undersigned". What does that mean? Would any school boy know what that means? What was their share? Why was that put in? Was that merely again to reassure Edward C. Behm, the father of said children, that this action was merely for the benefit of the children? I am afraid that Attorney Jones has either given more credit to the simplicity of this masterpiece of malapropism than it deserves, or he has credited the school boy with undue perspicacity.

The above assignment is exactly as set out. "Deceased" is not a printer's mistake. Neither Behm, Gee, nor Attorney Jones knew what Exhibit 6 meant.

Mr. Perry in his work upon *Trusts,* Volume 1, discusses at great length the rules relative to constructive trusts and constructive fraud. On page 352, section 205, he says:

> "The same principles apply to attempted purchases by administrators and executors of the estate under their charge to administer. When the purchase is directly from beneficiaries of their interests, or when the purchase is assented to by all the beneficiaries, the executor or administrator has the burden of showing that the beneficiaries selling or those assenting to his purchase knew that he was the purchaser and were fully informed by him of everything which might influence them

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> in selling their interests or assenting to his purchase of the property, and that no undue influence was used by him and no unfairness practiced."

And again:

> "This rule is so strict, that they cannot purchase any of the assets of the estate under their charge, although the assets are ordered by the court to be sold at public auction."

In re *Robertson's Estate,* 1 N.Y.S. (2d) 423 (1938).

This was a decision by the surrogate court of New York and was a proceeding in the matter of the estate of a deceased person. It involved the validity of an assignment.

> "An assignment made by a distributee to an administrator or to one about to become an administrator of an estate, should be set aside when procured through false representation."

In this case the surrogate court quotes the language of Judge Cardozo as follows:

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Wendt v. Fischer, 243 N. Y.

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> 439, 444, 154 NE 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Was Behm fully informed either by Alma Gee or by Mr. Jones? Absolutely not. Mr. Jones all through this case has acted as the personal attorney for Alma Gee, rather than for the heirs. He owed a duty to keep them all fully informed. He knew when he prepared Exhibit 6 that he was attempting to prepare an instrument that would assign a valuable right of Edward C. Behm to Alma Gee. It was his duty to inform Behm fully as to what he thought the purport of Exhibit 6 was. Not only did Attorney Jones fail to enlighten Edward C. Behm fully, but he failed to keep him informed as to the progress of the case, and gave him the brush-off when he, Behm, went to Jones' office with what he, Behm, thought was valuable information.

Neither Attorney Jones nor Gee notified Behm that a settlement had been made. It seems strange indeed that the petition for administrator and the petition for guardian were ready and waiting for Behm in Attorney Jones' office, but this complicated, misleading instrument, termed an "assignment", Exhibit 6, was sent some two weeks later by Attorney Jones with Alma Gee to be signed away from an attorney's office. Witness Jones testified that when he had the petition for administrator and guardian signed, he took Behm in to another attorney, Gordon Strong, and explained the situation in front

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of Mr. Strong. It seems strange indeed that a transaction of the importance of this one, signing Exhibit 6, and it appears that Witness Jones and Witness Gee knew of its importance, was not deserving of formal and regular attention; they, knowing that Behm was signing over all of his rights to Gee in this substantial matter, should have seen to it that this man Behm was taken before some disinterested attorney who would fully explain the contents of the instrument and its legal effect.

Yes, if this Exhibit 6 is considered as a contract, then clearly the exhibit itself is conclusive and decisive evidence of fraud, but this exhibit and its execution is coupled with other inequitable incidents. These incidents operate to throw the burden of proof on the party, Alma Gee in this case, seeking to reap the benefits of this action, and this burden of proof requires that Alma Gee show that Edward C. Behm acted voluntarily, knowingly, intentionally, and deliberately, and with the full knowledge of the nature and effects of his acts, and that his consent was not obtained by any oppression, undue influence or undue advantage taken of his condition, situation or necessities.

2 *Pomeroy's Equity Jurisprudence,* page 1671.

Finding such fiduciary relationship existing between the parties, then the burden is upon Alma Gee to establish that Behm acted voluntarily, and that he knowingly and intentionally and deliberately gave his interest in the proceeds of the recovery for the wrongful death to Alma

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Gee. It must be established that he knew what he was giving, and if the proof fails, as it does fail, to show this intentional, deliberate act of Behm, then equity presumes what is known as a constructive fraud, even though Alma Gee himself acted in good faith and with good intention.

Constructive fraud does not depend upon the evil intent of the person charged with such fraud, but it rests upon broad grounds of public policy to accomplish the end of protecting society in general. Men are not permitted to abuse confidence, and when the relation is such that the confidence is reposed by one person in another, then, unless the one in whom the confidence is reposed shall show that the transaction is fair and intentional in every respect, equity conclusively presumes what it calls "constructive fraud". It is perfectly possible for an attorney to make a purchase from his client in perfect good faith, or an administrator to buy the interest of an heir in the best of faith. The transactions can be as beneficial to the parties concerned as any other regular transaction, but an attorney or an administrator who engages in such a transaction is treading upon dangerous ground for the reason that such contracts are prima facie fraudulent.

This contract in this case is prima facie fraudulent. The danger of allowing such transactions to stand is that if once the door is opened, then attorneys, administrators, special representatives, and many others will enter at that opening and great frauds will be committed and unconscionable contracts will be made.

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a person agreeing to accept a part of the proceeds of a suit which he under guise of philanthropy is to aid in prosecuting is guilty of champerty. However, the assignment of a cause of action not otherwise champertous is not made so by lack of a full money consideration when the transfer is between father and son, or brother and brother."

McClellan v. Oliver, 181 S.W. (2) 784, 238 Mo. App. 409, states:

"Though persons closely bound by ties of blood, family or affection may assist each other in litigation in an honorable way, they may not do so for gain of a part of the matter litigated.

"A contract to assist in litigation for a share in the proceeds need not be entered into with bad motives in order to be against public policy and void."

(The above case is where a brother and sister contracted to join cases on adoption and split proceeds.)

Further, quoting from 14 C.J.S. 369, sec. 27:

"Provided he does not do so for the purpose of speculation, a kinsman of a suitor may render aid in the prosecution or defense of a suit without being guilty of champerty or maintenance.

"A person who is related by ties of consanguinity or affinity to either of the parties to a suit may rightfully assist in the prosecution or defense of such suit either by furnishing counsel or by contributing to the expense thereof; but the reason for the rule ceases and the rule is not applicable where a kinsman meddles in or main-

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> tains the suit for the purpose of personal speculation or profit. Otherwise stated, relationships by blood or marriage may justify maintenance, but not champerty."

Thus we see that the assignment, Exhibit 6, along with all its other infirmities is also champertous, and the lower court very properly made its finding to that effect.

CONCLUSION

We submit that the appellant certainly has no cause to complain of the rulings of the lower court in this matter. The allowance by the lower court to Alma Gee of $750.00 which he had unlawfully appropriated was much more than he was entitled to. The fact that the lower court did not see fit to allow Behm more than $500.00 in this recovery is no concern of the appellant. Behm was willing that the balance of the money go to the children. The fact that appellant's attorney feels that it would be dissipated by a trust company has no bearing in the case. In passing, we might comment that the attorney himself, while a witness on the stand, testified that he once said, "I agreed with you that the trust company should be the one that would handle this money for the children and that that would be satisfactory with me" (R. 188).

The record shows conclusively that from the beginning there was a misconception of the law. The claim for wrongful death was treated as belonging to the estate, even to the extent of probate proceedings and the belief

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that what was left of the fund recovered from the doctor should be subject to estate attorney's fees, administrator's fees and claims of creditors.

The evidence shows beyond a peradventure of a doubt that the complicated, unintelligible instrument, labeled an assignment, was void on its face. It attempted to assign something that could not be assigned. It was champertous and totally without consideration, and there was an equitable fraud perpetrated by Alma Gee in this case upon the protestant, Edward C. Behm, and Alma Gee failed in his burden of establishing that the assignment, Exhibit 6, was obtained in good faith and under circumstances excluding undue influence, deceit, or other improper means.

Therefore, the judgment of the lower court should be affirmed.

Respectfully submitted,

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